

These are the tentative rulings for civil law and motion matters set for Tuesday, June 10, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, June 9, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

**NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. Telephone appearances through June 2014 will continue to be governed by the current Local Rules. More information is available at the court's website, [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).**

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**EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.**

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**1. M-CV-0060173      Phoenician Homeowners Ass'n vs. Chan, Richlin, et al**

Plaintiff's motion to strike/set aside incorrect dismissal is granted. Code of Civil Procedure section 473(b) provides that where a dismissal is entered as the result of an attorney's mistake, inadvertence, surprise or neglect, relief from the dismissal is mandatory if requested within six months. Plaintiff's counsel adequately demonstrates that he mistakenly and inadvertently filed a request for dismissal in this action, and has requested relief within the requisite time period.

The prior trial and mandatory settlement conference dates set in this matter are restored. A one-day non-jury trial is set for January 12, 2015. A mandatory settlement conference is set for December 19, 2014 at 8:30 a.m. in Jury Services.

**2. S-CV-0026760      Yanez, Michael vs. Union Pacific Railroad Co., et al**

This tentative ruling is issued by the Honorable Jerald Lasarow (Ret.) If oral argument is requested, it shall be heard on June 10, 2014 at 11:00 a.m. in Department 4, located at 101 Maple Street, Auburn, CA.

Plaintiff Michael Yanez's Motion to Reconsider (1) the Denial of Leave to Plaintiff to File a Second Amended Complaint Made in Response to Union Pacific's Motion for Judgment on the Pleadings and (2) the Prior Ruling Granting Judgment on the Pleadings to Union Pacific is granted in part.

With respect to the court's denial of plaintiff's request for leave to file a second amended complaint, the motion is granted. Pursuant to Code of Civil Procedure section 1008(b), the party who originally made an application for an order may seek reconsideration of that order based on new or different facts, circumstances or law. Plaintiff originally made the application for leave to file a second amended complaint in connection with his opposition to defendant Union Pacific Railroad Company's ("UPRR's") motion for judgment on the pleadings. This request was denied on the grounds that plaintiff had delayed until the eve of trial to seek leave to amend, and such delay would prejudice defendant.

Motions for reconsideration are restricted to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500. Plaintiff adequately demonstrates circumstances not previously considered, in that the previous trial date of February 27, 2012, the court day following the hearing on the motion, has since been vacated. Plaintiff's appeal of a court order granting summary judgment against defendant Brian Plummer was subsequently reversed, and upon remand discovery has been reopened. Such circumstances did not exist at the time the court made its ruling regarding plaintiff's request for leave to amend his complaint. Accordingly, there is good cause for the court to reconsider its prior ruling denying plaintiff leave to amend his complaint.

Upon reconsideration, plaintiff's request for leave to amend his complaint is granted. Plaintiff demonstrates a reasonable possibility that defects previously noted in the court's ruling on UPRR's motion for judgment on the pleadings may be cured by amendment. *See Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402. Nothing prevents defendants from challenging the legal sufficiency of the amendments by appropriate motion. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761. Nor will permitting amendment at this time prejudice defendants, as there is currently no trial date set in this action.

With respect to the court's grant of UPRR's motion for judgment on the pleadings, the motion is denied. Plaintiff seeks relief pursuant to Code of Civil Procedure sections 1008(b) or 1008(c). Section 1008(b) expressly applies only to a subsequent application by the party who originally made the application for an order. As plaintiff is not the party who originally moved for judgment on the pleadings, plaintiff may not move under section 1008(b) for reconsideration.

This leaves section 1008(c) as the only remaining basis for reconsideration of the order on UPRR's motion for judgment on the pleadings. Section 1008(c) states: "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." Plaintiff argues that new law of the case is established by the Third District Court of Appeal's decision in *Yanez v. Plummer* (2013) 221 Cal.App.4th 180, by which the trial court's ruling granting summary judgment as to defendant Brian Plummer was reversed.

Plaintiff fails to demonstrate how the *Yanez v. Plummer* decision constitutes a "change of law". The Court of Appeal determined that the trial court had erred in granting summary judgment in that a triable issue of material fact existed regarding the element of causation. Plaintiff does not explain how this decision created a change of law that existed at the time the

motion for judgment on the pleadings was heard. As noted above, a change of circumstances exists, but Code of Civil Procedure section 1008(c) refers only to a change of law, not facts or circumstances.

Plaintiff shall file and serve the proposed second amended complaint attached as Exhibit 4 to the motion by no later than June 27, 2014.

**3. S-CV-0031192 County of Placer vs. Lanman, Alison, et al**

Defendants Alison and Paul Lanman's motion to enforce settlement and for sanctions is denied.

The Lanmans' request that the court enforce the settlement agreement reached at the mandatory settlement conference on October 31, 2013 has been rendered moot, as the parties agree that a formal settlement agreement has now been executed by all parties.

The Lanmans do not demonstrate a violation of Local Rule 20.1.11, which permits sanctions to be imposed against a party or counsel for failure to appear, failure to file a statement or document required by the rules, or failure to participate effectively in any conference in good faith. The Lanmans do not establish that any other party failed to participate in the mandatory settlement conference in good faith, particularly since a settlement was reached at that time. The Lanmans' argument that the rule regarding failure to participate in the conference should be extended to subsequent efforts to finalize a written agreement is not supported by a plain reading.

In their reply brief, the Lanmans assert a new argument, that meet and confer discussions between counsel may constitute "conferences" under Local Rule 20.1.11. However, the Lanmans' reading of the rule is overly broad, and would seem to allow for any correspondence between counsel at which the parties' differences were not resolved to constitute a violation.

As the Lanmans fail to prove a violation of Local Rule 20.1.11, the request for sanctions is denied.

**4. S-CV-0032113 Rose, Stephen, et al vs. Lennar Renaissance, Inc.**

Intervenors Travelers Indemnity Company and Allied Insurance Company's motion for leave to file complaint in intervention is granted. Intervenors shall file and serve their complaint-in-intervention by no later than June 27, 2014.

**5. S-CV-0032437 Tiskiy, Nadezhda, et al vs. Teuscher, Wade, et al**

The motion for summary judgment was continued to June 17, 2014 at 8:30 a.m. in Department 40.

**6. S-CV-0032487 Dept. of Fair Employment and Housing vs. Morrison, Elaine**

The three petitions to compromise minor's claim on behalf of minors Kaitlyn Allbee, Sydnee Albee and Aleena Albee are denied without prejudice. The application requests that money be held "on such conditions as the court determines are in the best interest of the minor." The petitions reference proposed conditions attached as Exhibit 19(b)(8) but no such exhibits are attached to the petitions.

**7. S-CV-0033005 Royo, Afsaneh vs. Interpose Inc., et al**

The motion of Leticia Gonzalez and Skane Wilcox LLP to be relieved as counsel for defendant R&R Custom Windows & Glass is granted, effective upon filing of proof of service of the court's order on R&R Custom Windows & Glass and all parties who have appeared in this action.

**8. S-CV-0033045 Hunter, John G. vs. Safeway, Inc.**

Request for Judicial Notice

Defendant Safeway Inc.'s request for judicial notice is granted as to Exhibit A, and denied as to Exhibit B. Evidence Code section 452(c) authorizes judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." "Official acts" includes records, reports and orders of administrative agencies. *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518. However, while it may be appropriate to take judicial notice of the existence of websites, and official documents contained therein, judicial notice may not be taken of the truth of factual content stated. *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal.App.4th 514, 519; *see also Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063–1064 (recognizing that although public documents may be proper subjects for judicial notice, the truth of the matters stated in such documents is not), overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262.

Safeway Inc. asks the court to take judicial notice of the truth of the matter stated in Exhibit B, to establish that Safeway Inc. is a licensed pharmacy by the California Department of Consumer Affairs Board of Pharmacy. As noted above, this is not appropriate. Moreover, the website printout itself states "the Department makes no guarantee as to the accuracy, completeness, timeliness, currency, or correct sequencing of the information."

Ruling on Motion for Summary Judgment

Safeway Inc.'s motion for summary judgment is denied.

Summary judgment may be granted where there is no triable issue as to any material fact, and moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). Defendants moving for summary judgment bear the burden of persuasion that one or more elements of the causes of action in question cannot be established, or that there is a complete

defense thereto. Code Civ. Proc. § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. Only if the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact does the burden shift to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. *Id.*

Safeway Inc. asserts that a one-year statute of limitations bars plaintiff's claim, as plaintiff asserts professional negligence against a health care provider as defined by Code of Civil Procedure section 340.5(1). Safeway Inc. states that it is a health care provider as defined by the statute because it is a licensed pharmacy by the California Department of Consumer Affairs Board of Pharmacy. This fact is supported only by the request for judicial notice, and as noted above, the request for judicial notice is insufficient to establish competent evidence of the contention that Safeway Inc. is a licensed pharmacy.

Until defendant meets its burden of production, plaintiff has no burden to oppose. Code Civ. Proc. § 437c(p)(2). As Safeway Inc. has not met its burden of production, the burden does not shift to plaintiff to establish a triable issue of material fact. Based on the foregoing, Safeway Inc.'s motion for summary judgment is denied.

If oral argument is requested, Safeway Inc.'s request for telephonic appearance is granted. All telephonic appearances must be arranged through CourtCall. *\*\*Note: Effective July 1, 2014, all telephonic appearances will be governed by Local Rule 20.8. More information regarding this change is available at [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).*

**9. S-CV-0034049 Northern Cal. Collection Service vs. Mercury Solar Systems**

Mercury Solar Systems, Inc.'s motion for leave to file cross-complaint is granted. Moving party shall file its cross-complaint by no later than June 27, 2014.

**10. S-CV-0034296 U.S. Bank, N.A. vs. NNN Parkway Corporate Plaza, LLC, et al**

Motion re Appointment of Receiver

The motion re receiver is dropped, as the parties' stipulation regarding appointment of receiver has been filed.

Motion for Preliminary Injunction

Appearance required on June 10, 2014 at 8:30 a.m. in Department 40 on defendants and cross-complainants' request for preliminary injunction.

Plaintiff U.S. Bank National Association's ("U.S. Bank's") request for judicial notice is granted. U.S. Bank's objections to the declaration of Thomas A. Tarter are ruled on as follows: Objection Nos. 1, 2, 3, 5, 7, 9 and 10 are sustained. Objection Nos. 4, 6, 8 and 11 are overruled. U.S. Bank's objections to the declaration of Gary Musick are ruled on as follows: Objection Nos. 3, 4, 6, 12, 13, 14, 15, 16, 22, 25, 32, 34, 35, 36, 44 and 48 are sustained. The remainder

are overruled. U.S. Bank's objections to the declaration of Lori Bluett are ruled on as follows: Objection Nos. 6 and 7 are sustained. Objection Nos. 1, 2, 3, 4 and 5 are overruled.

Pursuant to defendants and cross-complainants' ("cross-complainants") ex parte application, filed May 29, 2014, the court set this matter for hearing on June 10, 2014 regarding whether a preliminary injunction should issue enjoining U.S. Bank, CWC Capital Asset Management LLC and Old Republic Title Company, or their agents, servants, employees representatives, and all persons acting in concert or participating with them, from proceeding with the non-judicial foreclosure of the real property that is the subject of this action. The court may grant a preliminary injunction when it appears from the complaint or affidavits that the moving party is entitled to the demanded relief and the moving party would suffer irreparable injury if the enjoined action were allowed to proceed. Code Civ. Proc. § 526(a). A foreclosure sale may be enjoined under the same elements applicable for other requests for injunctive relief, namely after (1) a balancing of the hardships of the parties and (2) a showing by the moving party of a reasonable probability of prevailing on the merits. *Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 824; *Robbins v. Superior Court* (1985) 38 Cal.3d 199. U.S. Bank has provided no authority for the proposition that tender of the total amount due and owing under the note and deed of trust is a prerequisite to obtaining a preliminary injunction. The court has not considered unpublished cases cited by U.S. Bank, as such decisions are not precedential to this court.

In considering the hardships upon the parties, the moving party has the burden of showing that he or she would be harmed if the preliminary injunction were not granted. *Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838. Cross-complainants have adequately demonstrated irreparable harm if a non-judicial foreclosure is allowed to take place through the declaration of George Musick. Although U.S. Bank also attests to harm if the injunction is granted, the balance of equities favors cross-complainants.

The moving party must also present sufficient evidentiary facts to establish that there is a reasonable probability of prevailing on the merits of the action. Code Civ. Proc. § 526(a)(1); *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1478. Upon review of all evidence submitted in support of and in opposition to the request for preliminary injunction, the court finds that cross-complainants have submitted sufficient evidence to establish a reasonable probability of prevailing on the issues set forth in their cross-complaint. A preliminary injunction is therefore warranted to preserve the status quo pending trial in this action.

The granting of the preliminary injunction is contingent upon the posting of an undertaking in the amount of estimated damages that will be suffered by U.S. Bank if it is finally determined that cross-complainants were not entitled to the injunction. Code Civ. Proc. § 529. As the parties have not provided sufficient information for the court to determine a sufficient undertaking, this matter is continued to June 24, 2014 at 8:30 a.m. in Department 40. The parties may submit supplemental briefings relating to the appropriate amount of the undertaking by no later than June 19, 2014.

The parties may appear telephonically through CourtCall. *\*\*Note: Effective July 1, 2014, all telephonic appearances will be governed by Local Rule 20.8. More information regarding this change is available at [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).*

**11. S-CV-0034669 Rahbarian, Paiman vs. JP Morgan Chase**

The order to show cause regarding preliminary injunction is denied. On May 20, 2014, plaintiff obtained an order granting a temporary restraining order restraining defendant JPMorgan Chase from proceeding with the foreclosure sale of his home, and setting an order to show cause why a preliminary injunction should not issue. Plaintiff was required per the order to personally serve defendant no later than May 23, 2013 by personal service, and to file proof of service by June 3, 2014. As of this date, no proof of service has been filed. Accordingly, the request for preliminary injunction is denied. The temporary restraining order issued on May 20, 2014 shall be dissolved forthwith.

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